BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	
CREATION OF A LOW POWER RADIO SERVICE	MM Docket No. 99-25
Amendment of Service and Eligibility Rules for FM Broadcast Translators Stations	MB Docket No. 07-172 RM-11338

To: Marlene H. Dortch, Secretary
Federal Communications Commission
Attn.: The Commission

COMMENTS OF EDGEWATER BROADCASTING, INC., AND RADIO ASSIST MINISTRY, INC.

Respectfully submitted

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&
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SUMMARY

EDGEWATER BROADCASTING, INC., and **RADIO ASSIST MINISTRY, INC.** (the "*Ministries*") generally support the overall objective of the Local Community Radio Act of 2010 ("*LCRA*"). Regarding the conundrum presented by the language of LCRA dealing with "stations" as opposed to "applications," the Ministries submit that the term "stations" is subsumed within the meaning of "applications," and the terms are interchangeable. Also, the Ministries submit that wholesale dismissal of pending FM translator applications would be improper. Further, the FCC's existing rules create an inequality between FM translator and low-power FM ("*LPFM*"). To help address the innate inequality, perhaps the Commission should adopt procedures permitting FM translator authorizations to be morphed into LPFMs. The Ministries contend that (1) there is more available spectrum for LPFM than the Commission supposes; (2) "spectrum floors" are arbitrary and not demand based; (3) market caps, rather than total application caps, should be applied to limit ownership of FM translators; and (4) the Commission should not bar transmitter site changes to achieve settlements. Finally, the Ministries take umbrage at the insinuation that the Ministries have been trafficking in FM translator authorizations or have done anything rising to the level of wrong-doing.

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EDGEWATER BROADCASTING, INC. ("*EB*") and **RADIO ASSIST MINISTRY, INC.** ("*RAM*;" and together with EB, the "*Ministries*"), hereby submit their consolidated comments regarding certain issues raised in the *Third Further Notice of Proposed Rulemaking,* Creation of a Low Power Radio Service *("Third Further NPRM"),* 76 Fed Reg. 45491 (July 29, 2011).

Introduction. The Ministries generally support the overall objective of the Local Community Radio Act of 2010 ("*LCRA*"), but wishes to emphasize that the FCC must exercise formidable restraint and acumen to ensure that low-power FM ("*LPFM*") and FM translators remain *in equal status*.

The Conundrum of "Station" Versus "Application." Arguably, the conundrum presented by the language of LCRA in dealing with "stations" rather than "applications"

creates almost a riddle of "which came first – chicken or egg?" The Ministries support the concept that when the Congress employed the word "stations," it intended, meant and included therein the term "applications."

When considering the regulatory evolution of a "station," there typically are three phases – (1) an application, (2) a grant which yields a construction permit, and (3) the build-out of the construction permit and licensing of the *station*. That is to say that, technically, any unbuilt authorization is merely a construction permit, and not a *station*. So, carrying the concept and the language to its logical conclusion, with the strict construction of the term "*stations*," the Commission could be precluded from considering any other competing *applications* that may affect or be affected by a *station* until after a single authorization first was granted, and the construction permit built-out and licensed. Hence, to construe that the Commission must, under LCRA, give consideration only to *stations* effectively would serve (i) as a processing bottle-neck regarding other *applications*, and (ii) to stymie the effective implementation of broadcast facilities in either the LPFM or FM translator services. That is not a palatable result.

Accordingly, the Ministries respectfully submit that under the LCRA the meaning of "*stations*" must be inclusive of "*applications*;" and that for regulatory processing proposes under LRCA, the two terms are essentially interchangeable.

Wholesale Dismissal of Pending Applications Would Be Improper. The Ministries submit that the unilateral wholesale dismissal of only FM translator applications, as posited in the Third Further NPRM, would be a breach of "the equal

status" mandate of the LCRA. This would be particularly true in markets where no availabilities exist for an LPFM facility. While application dismissal may, perhaps for only a brief time, simplify the application processing procedures, any blanket dismissal likely will create legal challenges and issues for the staff, and not necessarily serve the public interest.

One of the ironies of the Third Further NPRM is that the Commission seems to fret about delays in processing, given that the bulk of pending FM translator applications. In the next breath, however, the Commission contemplates blanket dismissal of all the applications. That raises the question of which is worse: dismissing an application sans any review or consideration at all, or delaying the applications' processing. Certainly, justice delayed, in fact, may be justice denied, but arbitrary application dismissal is but an administrative form of capital punishment – it clearly is justice denied.

At the threshold, the bulk of the FM translator applications were filed because of a perceived value of the location and/or the facility to serve an area or community of people. Someone somewhere believed that each facility conceived by an application had some sort of social or economic value. Accordingly, the indiscriminate dismissal of applications to achieve administrative convenience will run contrary to the concept of the Communications Act of 1934, as amended, for developing communications services for the public interest, convenience and necessity. The Ministries submit this would be particularly true where perfectly serviceable FM translator facility may be dismissed and no serviceable LPFM may be allocated to serve all or a portion of the area that would

have been served by the dismissed FM translator. Such an action, without a meaningful service analysis, likely would rise to the level of being arbitrary and capricious.

Innate Inequality Between FM Translators and Low-power FM. The Ministries submit that an innate inequality between FM translators and LPFM is "baked into" the Commission's existing rules. With good reason, the rules make FM translators easy and cheap to operate. The licensing qualifications for FM translator stations are relatively simple and uncomplicated.

Conversely, the licensing requirements for LPFM are quite rigorous, and the expense of operation and maintenance for LPFM is far greater than for FM translators. In short, the current rules essentially create a demand disparity between the two services, a disparity that has been intensified by the recent rule changes permitting AM stations to use FM translators. Let there be no mistake that the Ministries, indeed, strongly support AM station use of FM translators. The AM allowance, however, is cited simply to underscore at least one of the current reasons for a demand disparity between FM translators and low-power FM, and to accentuate the reason for the ostensible demand for the FM translator service.

In the NPRM, the Commission seeks comment on how to interpret the LCRA's requirement that translators and LPFM's "remain equal in status." The Commission seems to see two possible interpretations of this requirement. On the one hand, it could be taken to mean that no preference ought to be given to one service over the other in the processing of applications and future development of rules. On the other hand, the

Commission seems to suggest that Congress could have intended the Commission to attempt to achieve approximately equal numbers of translators and LPFM's in any given market. This latter interpretation appears to lie behind the suggested wholesale dismissal of so many translator applications as well as the suggestion that no modifications ought to be allowed in an MX resolution period. However, due to the innate demand disparity between translators and LPFM's, this latter interpretation can only possibly lead to future systematic suppression of the translator service and simultaneous artificial subsidization of the LPFM service, an attitude for which this NPRM, if adopted, would provide precedence. It is hard to see how this could possibly have been the LCRA's intended meaning. Instead, it seems that artificially favoring the one service and suppressing the other is the exact opposite of the clear meaning of the LCRA's "equal status" wording.

The demand disparity highlighted above could possibly be closed by the Commission pursuing rules changes that would allow LPFM's and translators to be applied for and/or operated in a more similar manner, or allowing one type of station to be converted into the other under certain circumstances. Such an approach would be supported by the Ministries and would seem to more reasonably approach the LCRA's "equal status" requirement, in terms of promoting both equal processing and a movement toward more equal numbers of operating stations, than anything suggested in the LPRM.

That concept aside, the Ministries earnestly requests that the Commission process, and not dismiss, all the FM translator applications that were submitted in response to the 2003 window. Practically speaking, the FCC invited the filing of the applications that

were submitted during the window, so now – eight years later – to decide that it should have adopted some alternative procedure is very lame and, perhaps, without precedent. If the concept of "bait and switch" were applicable to administrative regulatory practice, the proposal to dismiss the applications invited by the 2003 window smacks of bait and switch. Changed circumstance, given the LCRA, plainly bear upon the Commission's thinking and proposed actions respecting the 2003 FM translator window, but the Ministries respectfully submit that the strategies proposed to address those changed circumstances may not have yet been fully deliberated. That, of course in part, is the function of the Third Further NPRM.

There is More Available Spectrum for LPFM than Supposed. In Section III-B(3) of the Third Further NPRM the Commission contemplates a market specific, spectrum availability-based FM translator dismissal policy. A point previously raised by the Ministries is that there are far greater spectrum opportunities for FM translator and LPFM than the Commission presently is considering.[1/] Better spectrum utilization could negate the contemplated FM translator dismissal policy.

[1/] Early in this Docket 99-25, the Ministries submitted technical demonstrations illustrating the token impact that existing FM full power radio stations, existing FM translator stations, and pending FM translator applications have upon existing LPFM stations and spectrum resources for additional LPFM stations (*i.e.*, LP100 stations). Although the study demonstrates that that LPFM proponents have ample opportunity throughout the United States to locate LP100 stations the Commission essentially has discounted the Ministries' data and has embraced a notion that LPFM's development is stymied by a paucity of usable spectrum. That notion appears to be antithetical to fact. *See* the Ministries' "Further Comments" submitted in this Docket on April 5, 2008.

Spectrum Floors are Arbitrary and Not Demand Based. The Commission also proposes the establishment of "service floors" whereby, depending on the size of a market, allotments for a given, arbitrary number of LPFMs should be guaranteed. While "service floors" may simplify processing for the Commission, they really do "place the cart before the horse."

The Commission has offered no rationale for the numbers it proposes for the "service floors." The numbers purportedly are loosely correlated to the number of noncommercial educational FM stations in various markets, but the Commission offers no empirical data to substantiate its proposed "service floor" numbers. The arbitrary numbers simply are set forth as a "given."

It seems the "service floor" concept is one of: "if we allot it, they will come," rather than a system formulated upon need or aspiration. Rather than arbitrary "service floors," perhaps the Commission should consider a "need hypothesis," a process that is more like the present rulemaking for the allotment of new FM channels. That is to say that if a proponent wishes to construct a new LPFM, or even an FM translator, then the proponent would have the obligation of publicly demonstrating the need, value and worth of the proposed new service in that community. This approach also could be applied to the displacement of one service for another, *i.e.*, an LPFM to displace an FM translator, or vice versa. Rather than imposing arbitrary levels of service, a "need hypothesis" approach would permit proponent-antagonists or argue which service – LPFM or FM translator – would better serve a community. It would impose upon spectrum allotment a

true "need" methodology rather than an arbitrary "service floor," the numbers for which there may be no actual demand. Moreover, considering such allotments on a case-by-case basis would better ensure "equal status" between the LPFM and FM translator services.

Unaddressed by the Commission in the Third Further NPRM is what happens, if the "service floor" concept is adopted and the full allotment of channels to a community are not applied for. For example, what if seven LPFM channels are allocated to a community and only two are applied for? What does the Commission do with the dormant spectrum? Does it lie fallow? If so, for what duration? Does the Commission re-purpose the spectrum to another use? How would any re-purposing be determined? If the spectrum were to be re-purposed, when would that occur? None of these questions are addressed in the Third Further NPRM.

Apply Market Caps, Not Total Application Caps. In Section III-C the Commission proposes application caps to "deter speculative licensing conduct."[2/] It suggests a possible limit, during any filing window, of between 50 and 75 applications. The Ministries suggest a better alternative: Do not limit the number of total applications one party may file, but cap the number of applications that may be granted to one entity (or its affiliates) within a given market. The Ministries suggests that that per-market limit be three(3).

A reason not to limit the total number of applications that one party may file is because the greater the number of applications, the greater likelihood for competition.

[2/] *See*, Third Further NPRM, ¶ 32.

Moreover, applications serve to reveal potential spectrum availability and/or allocation plans that otherwise may not be apparent. Therefore, although one party may be limited in the number of permits it may acquire in a particular market, society may be enriched by the potential for allocations that are revealed by submitted but ungranted (or ungrantable – because of cap limits) applications.

The Ministries Take Umbrage with Commission's Insinuation of Wrong-Doing. At this juncture, the Ministries wish to take issue with the characterization in Third Further NPRM that either EB or RAM have done anything improper by filing numerous applications in connection with Auction 83 or the 2003 FM translator window, and then selling some of them. Principally, the Commission has insinuated that, because the Ministries submitted scores of applications using computer technology to identify communities and to prepare applications, those activities somehow were improper. Moreover, the Ministries are accused of trafficking in authorizations. Notably, no rule violations are cited in the Third Further NPRM because, the Ministries respectfully submit, there have been none.

The trafficking allegations are predicated upon the fact that the Ministries have acquired and subsequently sold FM translator station authorizations in return for financial remuneration. Again, no evidence that any FCC rules or policies have been violated by the Ministries – not even a scintilla of support, in any form of case law or policy citations, that any wrong-doing has been perpetrated. The fact is that any sale and assignment of an FM translator is subject to prior Commission consent. If there is even a

scintilla of impropriety in the transactions the Ministries have initiated, then why has the Commission consented to the transactions brought forth by the Ministries? The answer is evident: There has been no wrong-doing.

It previously has been highlighted by the Ministries in this proceeding – but apparently overlooked, if not ignored by the Commission – that an element of the Ministries' publicly disclosed mission is the ambition for:

> (T)ransferring hundreds of construction permits to other nonprofit organizations and is assisting many of them in the development of their networks, true to their vision and goals. They (the Ministries) have donated many translator construction permits and are in the process of donating many more. (*See*, http://www.edgewaterbroadcasting.com/about.php)

In short, the Ministries – in disposing of some of the authorizations they have acquired – only have been implementing their disclosed mission, and have been doing so in a manner consistent with the FCC's rules and policies.[3/] Of course, in today's secular world the thought of proliferating, perpetuating or espousing the word of a Christian God via radio, often is viewed as an offense, unto itself. Until, however, the Commission determines that it is improper to use computer technology to identify communities that may be eligible for broadcast facilities, or to prepare FCC applications for electronic submission, then the use of such methodologies is not improper or unlawful, and an allegation that the Ministries' purpose and intent was to traffic in FM translator authorization is reprehensible and totally misplaced. An implied bias against the

[3/] Any financial resources derived from the sale by the Ministries of any FCC authorization, whether held by EB or RAM, have been applied to the development, construction and operation of the sixty station, *not-for-profit* Edgewater Broadcasting Network. This is an eleemosynary, rather than a self-centered commercial, enterprise.

innovative use of technology to prepare and submit FCC applications should not be the basis for dismissing or denying applications that otherwise are legally and technically sufficient. Moreover, to even posit impure motives for assigning such authorizations, *given the prior approval and consent of the Commission in each instance*, is capricious, if not arbitrary.

More fundamentally, as the Ministries previously have noted, the FCC has control of its own processes and procedures. If the Commission is not satisfied with the consequences of its decisions, whether intended or not, it is up to the Commission, in due course and consistent with law, to adjust those processes and procedures. It is not the obligation of any applicant to forebear from fully utilizing the Commission's systems and procedures because at some future date the exercise may be deemed to be untoward or exploitive, when at the time of utilization they are neither. It is not the duty of applicants to regulate the Commission, but rather the duty of the Commission to regulate its applicants with foresight – not retroactive nor regressive actions taken in hindsight. Once the Commission implements reasoned rules and policies that address the concerns expressed in Section III-C of the Third Further NPRM, then the Ministries will adhere to those rules and policies. Until then, the Ministries respectfully submit that the implied aspersions set forth in Section III-C of the Third Further NPRM are unbecoming of a federal administrative agency, and fundamentally are unwarranted and improper.

Don't Bar Transmitter Site Minor Changes in Settlements. Lastly, the Ministries have a fundamental concern about the Commission's proposal to limit minor changes in

transmitter sites respecting FM translator settlements. Generally, at law, settlements are favored and are considered to be in the public interest and encouraged. Limiting the ability of applicants to achieve settlements which, in turn, may serve to break the Gordian Knot of many mutually exclusive application conflicts is, therefore, contrary to the public interest. Reason should grasp that the Commission should foster settlements, not impede them. Accordingly, the Ministries urge the Commission to reject any concept that restricts minor changes, particularly in transmitter sites, for effecting FM translator settlements.

WHEREFORE, the premises considered, the Ministries request the FCC consider the Ministries comments, that it not dismiss wholesale all pending FM translator station applications now on file, and refrain from insinuating assertions that merely because the Ministries has filed a copious number of applications and sold or assigned many, notwithstanding the absence of any limitations whatsoever, the Ministries somehow has abused the Commission's processes.

Respectfully submitted

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